Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1349

LOCAL 862, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - - - Petitioner

versus

FORD MOTOR COMPANY and DOLORES MARIE MEADOWS - - Respondents

On Petition For Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

---

BRIEF FOR RESPONDENT FORD MOTOR COMPANY IN OPPOSITION

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INDEX

	PAGE
Opinions Below	2
Counterstatement	2– 6
Argument	7– 9
Conclusion	10
Appendix A: Findings of Fact and Conclusions of Law of the District Court, August 23, 1973	A-1
Appendix B: Letter From Counsel for the Petitioner in Lieu of a Brief to the Court of Appeals	B-1
Appendix C: Union's Petition to the Court of Appeals for Rehearing and Suggestion for Rehearing En Banc	C-1

CITATIONS

	PAGE
Adickes v. *S. H. Kress & Co.*, 398 U. S. 144 (1970)	8
Brotherhood of Locomotive Firemen & Enginemen v. *Bangor & Aroostook R.R. Co.*, 398 U. S. 327 (1967).	9
NLRB v. *Sears, Roebuck & Co.*, ___ U. S. ___, 43 U.S.L.W. 4491 (April 28, 1975)	8
Ramsey v. *United Mine Wkrs. of Amer.*, 401 U. S. 302 (1971)	8

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LOCAL 862, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - - - - - - - - - - *Petitioner*

v.

FORD MOTOR COMPANY and DOLORES MARIE MEADOWS - - - *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT FORD MOTOR COMPANY IN OPPOSITION

The Respondent, Ford Motor Company (hereinafter referred to as "Ford"), opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

In addition to the opinions cited in and appended to the Petition, the District Court issued Findings of Fact and Conclusions of Law on August 23, 1973, discussing remedies. Those Findings and Conclusions are unreported and appear as Appendix A hereto.

COUNTERSTATEMENT

This class action was commenced by the Respondent, Dolores Meadows, on July 20, 1971. In her Complaint, Meadows alleged that the Defendants, Ford, the International Union and its Local 862 (the Petitioner herein), were guilty of unlawful discrimination against her and other females on the basis of sex, resulting in a violation of Title VII, 42 U.S.C. §2000e, *et seq.*

Shortly thereafter, the International Union and the Petitioner moved the District Court to dismiss them from the action. The International Union was dismissed on procedural grounds, while the Petitioner's motion was temporarily overruled. However, Petitioner continued to renew its motion to dismiss throughout the course of the litigation, and, in its final judgment of December 12, 1973, the District Court dismissed the action, with prejudice, as to the Petitioner.

In its Findings of Fact and Conclusions of Law entered on August 23, 1973 [App. A], which were made a part of the final judgment, the District Court concluded that the employment practice in question, while

neutral on its face, was discriminatory in its effect on the class, and therefore violated Title VII. The District Court granted some affirmative relief by granting class members preferential consideration for future job openings. However, the District Court found that, in the particular circumstances of this case, no individual member of the class could prove that she had been personally affected by application of that employment requirement, and therefore that no member of the class was entitled to either backpay or retroactive seniority.

Consequently, the District Court never reached the question of how to fashion a seniority remedy; the District Court certainly did not reach the issue raised in the Petition of whether to require the employer to pay both discriminatees and affected long term employees in the event of a layoff. Indeed, the Petitioner was only a passive participant throughout the entire litigation in the District Court, making no suggestions to the Court as to alternative remedies for the alleged discrimination, and advancing no arguments at all as to the type of relief to which the Plaintiff or any member of her class might be entitled. Thus, the point which Petitioner seeks to present to the Court was mentioned by no one below.

Upon appeal by the Plaintiff to the Court of Appeals, the issue as to whether the Petitioner was properly dismissed was never raised by any of the parties in either the briefs submitted to the Court or in oral arguments. The Court of Appeals expressly stated that the appeal involved only the three issues raised

by the Plaintiff and did not involve the dismissal of Petitioner:

> The record showed that the two union defendants exercised no control over Ford hiring practices and the case as to them was dismissed by the District Court. No appeal was taken from this decision.
>
> * * * * * * *
>
> On this appeal we deal only with the plaintiffs' complaints (1) that the District Judge's judgment by refusing back pay and retroactive seniority failed to make them whole and failed to deter similar discrimination in the future, (2) that the District Judge defined the class of discriminatees too narrowly, and (3) that the attorney fees awarded did not consider all the work performed in this litigation. 510 F. 2d at 941, Appendix to the Petition at pp. 3a-4a.

Both the Plaintiff and the EEOC, as *amicus curiae,* filed briefs urging reversal of the District Court's denial of retroactive seniority, but not presenting the points raised by Petitioner here.[1] Petitioner, however, filed no brief in the Court of Appeals and, after the EEOC *amicus* brief was tendered, wrote a letter to the Clerk of the Sixth Circuit (appended hereto as Appendix B) stating that there was nothing in either Appellant's or *amicus'* briefs to which the union needed to respond. Although the Petition states that Petitioner participated in the oral argument, this over-

[1]Contrary to the assertion at page 5 of the Petition, the *amicus* brief was not filed after the due date of Ford's appellee's brief. In fact, Ford filed a separate brief in reply to the *amicus'* arguments on seniority and backpay.

states what actually transpired. During the course of the argument before the Sixth Circuit, the Court inquired of Petitioner's counsel whether counsel had anything to say to the Court. Counsel responded that the Petitioner had been dismissed with prejudice below and that this dismissal had not been appealed or questioned, and counsel had nothing further to present to the Court.

The only question of seniority before the Court of Appeals was the District Court's holding that, on the facts of this case, the class members could not show they were entitled to either backpay or retroactive seniority. While the Court of Appeals reversed that judgment, it did not direct the District Court to award retroactive seniority. Nor did it reach the issue, now raised for the first time in the Petition, of granting retroactive seniority to discriminatees while preserving the seniority privileges of incumbent employees. The Court of Appeals merely followed the customary appellate practice of obtaining the views of the court below and remanded the case for further consideration of whether to award retroactive seniority:

> [O]f course, the remedy for the wrong of discriminatory refusal to hire lies in the first instance with the District Judge. For his guidance on this issue we observe, however, that a grant of retroactive seniority would not depend solely upon the existence of a record sufficient to justify back pay under the standards of the Back Pay Section of this opinion. The court would, in dealing with job seniority, need also to consider the interests of the workers who might be displaced as well as the

interests of the employer in retaining an experienced work force. We do not assume, as our brethren in the Fifth Circuit appear to (Local 189, AFL-CIO, CLC v. United States, 416 F. 2d 980, cert. denied, 397 U. S. 919, 90 S. Ct. 926, 25 L. Ed. 2d 100 (1970)), that such reconciliation is impossible, but as is obvious, we certainly do foresee genuine difficulties. *See also* Jurinko v. Edwin L. Wiegand Co., 477 F. 2d 1038 (3rd Cir.), vacated, 414 U. S. 970, 94 S. Ct. 293, 38 L. Ed. 2d 214 (1973), reinstated, 497 F. 2d 403, (3rd Cir. 1974). *Cf.* Local 189, *supra;* Franks v. Bowman Transportation Co., 495 F. 2d 398 (5th Cir.), cert. denied, 43 U.S.L.W. 3330, —— U. S. ——, 95 S. Ct. 625, 42 L. Ed. 2d 644 (1974) (No. 74-424).

On remand the District Judge may desire to hear the policy questions involved in this problem before remanding the individual claims to the Master.

510 F. 2d at 949, Appendix to the Petition at p. 20a.

Thereafter, both Ford and the Petitioner petitioned the Court of Appeals for rehearing; but Petitioner does not assert that its rehearing petition raised the argument now urged upon the Court, which it did not (the Union's Petition for Rehearing is attached hereto as Appendix C). When the rehearing petitions of Ford and Petitioner were denied, Petitioner filed its Petition herein which raised that argument for the first time in this litigation.

ARGUMENT

Respondent respectfully submits that there are three independent reasons why the certiorari Petition should be denied in this case.

I.

First, Petitioner is no longer a party to this action. As the Court of Appeals' decision clearly shows, the District Court's dismissal of this action as to Petitioner was not appealed, and neither the Plaintiff, this Respondent nor Petitioner raised any objections whatsoever to the dismissal. The cases cited at page 10, footnote 3, of the Petition, *Banks* v. *Chicago Grain Trimmers Ass'n,* 389 U. S. 813; *Hunter* v. *Ohio ex rel. Miller,* 396 U. S. 879, are not analogous to the instant case. They are cases in which a nonparty, who was the real party in interest below, but whose interests had been represented by attorneys for governmental defendants, were allowed to intervene and petition for certiorari when the governmental defendants declined to petition. Accordingly, those cases do not alter the conclusion that a party previously dismissed from an action should not be permitted to reenter the case to seek review by certiorari. 28 U.S.C. 1254(1). The retention of Petitioner's name in the caption is the only remaining vestige of the Petitioner's connection with the case. But this is not sufficient to make Petitioner a party to this action when, on its own motion, it had been dismissed from the case with prejudice at the trial level, with no appeal taken from that order

of dismissal. Furthermore, Petitioner's inaction throughout this litigation makes its attempt to reenter the case now especially inappropriate.

II.

In addition, neither the argument which Petitioner is attempting to present to this Court, nor any similar argument, has ever been presented to either court below during the nearly four years of litigation that preceded the Petition. Consequently, if certiorari were granted in this case, this Court would not have the benefit of the lower court's views on Petitione 's arguments. Indeed, this Court apparently would not have the benefit of any lower court's views since Respondent is unable to locate any case in which Petitioner's arguments were presented and decided, and Petitioner has cited none. Accordingly, this is a classic case for applying the rule that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147 n. 2 (1970) and cases cited therein. *See, also, NLRB* v. *Sears, Roebuck & Co.*, —— U. S. ——, 43 U.S.L.W. 4491, 4500-01 (April 28, 1975); *Ramsey* v. *United Mine Wkrs. of Amer.*, 401 U. S. 302, 312 (1971).

III.

Finally, the interlocutory nature of the Court of Appeals decision in this case as to retroactive seniority makes it inappropriate to consider Petitioner's arguments at this time. The Court of Appeals has reversed

the District Court's conclusion that an award of back-pay and/or retroactive seniority is not justified in this particular case. However, the Court of Appeals has neither directed entry of such an award nor precluded such relief. Rather, the Court of Appeals merely directed the District Judge to take additional evidence and to give further consideration to the policy issues involved in deciding whether either of these remedial devices is appropriate in this case. Accordingly, the alleged conflict in circuits between *Franks* (No. 74-728) and this case on which Petitioner relies is non-existent. See the Petition, pp. 3, 7, 9 and 14. Indeed, this case is not yet ripe for review by this Court on the issue presented by the Petitioner. *See, e.g., Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R. Co.*, 389 U. S. 327 (1967).

CONCLUSION

For the foregoing reasons, Respondent Ford Motor Company respectfully submits that this Petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

DOLORES MARIE MEADOWS,
Plaintiff,

v.

FORD MOTOR COMPANY, et al.,
Defendants.

Civil Action
No. 7005

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Entered August 23, 1973)

Findings of Fact

1. On July 20, 1971, plaintiff filed this action alleging violations of Title 7 of the Civil Rights Act, 42 U.S.C. 2000e-5, et seq.

2. Defendant Ford Motor Company Filed an answer denying any violations of the Act, and alleging many defenses to the cause of action asserted by the plaintiff.

3. The other defendants who were made parties to this action have since been dismissed since they have no control over Ford's hiring practices or job requirements.

4. Plaintiff applied for production employment at defendant's Westport Road Truck Plant, hereinafter referred to as the Kentucky Truck Plant, on October 10, 1969. She did not receive employment at the plant and filed a complaint against the defendant, Ford Motor Company, alleging discrimination, based on sex, with the Equal Employ-

ment Opportunity Commission, hereinafter referred to as E.E.O.C., on January 14, 1970. Defendant Ford was officially notified by E.E.O.C. of plaintiff's charge on February 2, 1971.

5. On July 1, 1971, E.E.O.C. issued its right to sue letter to plaintiff and 19 days later she brought suit. Discovery procedures initiated by the plaintiff and records furnished by the defendant Ford established the following facts:

A. Defendant had a 150 pound weight requirement for employees on its production lines at the Kentucky Truck Plant from October 10, 1969 to January 26, 1973.

B. The weight requirement was dropped on January 26, 1973 because this Court issued a preliminary injunction and partial summary judgment enjoining its continuance.

C. Although the defendant had the 150 pound weight requirement, it was not applied inflexibly to males and some males were employed who weighed more than 135 pounds but less than 150 pounds.

D. The defendant also maintained a personnel classification, wherein females were never classified "A" but were classified "B". That classification meant that a female is a smaller person, and that work suitable for a smaller person should be assigned to females. See deposition of Dr. Charles E. Allen, Jr., question and answer 115, p. 35. The deposition of Lawrence Wilson Tolliver, Labor Relations Representative for Ford, taken on July 21, 1972, is very indefinite as to whether or not this classification is still maintained by Ford. Regardless of this indefiniteness, it seems to be established that Ford does not rely on this classification in assigning applicants for employment to jobs at the present time, but relies on the recommendations of Dr. Allen, its examining physician.

E. 82 females, in addition to plaintiff, applied for employment on the production line between the period October 10, 1969 and April 1, 1972. All of these females applied for employment during the period April 1, 1971 to April 1, 1972. No females were employed during this period, nor did any of them receive the physical examination required of all applicants for employment on the production line.

F. Ford made a scientific test to determine what relationship the 150 pound requirement had to the accomplishment of the task required on the production line.

G. Statistics offered by the plaintiff show that some 70 percent of women over 21 years of age weigh less than 150 pounds, and that 80 percent of men who are over 21 years of age weigh more than 150 pounds.

H. The records of Ford show that 935 males were employed on the production line during the period from October 10, 1969 to October 1, 1971.

I. The first female employee on the production line was hired on April 13, 1972. As of July 21, 1972 there were 3,300 employees on the production line, of whom 6 were females. During the six month period from August 1, 1972 to January 26, 1973, the defendant received 4,959 applications for employment, of which 373 were applications by females. Only 53 applicants were employed, and of that 5 of these applicants were females.

6. Ford has stated, as a defense to the action, that it participated in special hiring programs, such as employing disabled veterans, disabled persons and persons from various other laudable programs.

7. The Court, at this time, is not advised as to how many of the 82 female applicants for employment on the production line during the period October 10, 1969 to April 13, 1972 are still interested in employment. Inquiries will

be made by appropriate class action notices and the information will be in the hands of the Court by October 20th of this year.

8. The defendant's asserted practice with regards to employment on the production line is to hold the applications for ninety days, and then when a vacancy occurs to award it in chronological order to the first applicant who is qualified to fill the vacancy.

Conclusions of Law

1. The Court has jurisdiction of this action under the provisions of 42 U.S.C. § 2000e-5, et seq. and 28 U.S.C. § 1343(4).

2. Plaintiff timely filed her complaint with the E.E.O.C. on January 14, 1970, and timely filed her suit in this court on July 20, 1971, after permission to sue was given her on July 1, 1971 by E.E.O.C.

3. The 150 pound weight requirement imposed by the defendant, although neutral on its face, was discriminatory in its effect, in that no females were given a physical examination to qualify for employment during the period October 10, 1969 to April 1, 1972, and, further, in view of the fact that such requirements did exclude automatically some 70 percent of the women applying for employment because of their weight being below 150 pounds, whereas it gave some 80 percent of the males applying for employment an opportunity for employment, since that percentage averaged more than 150 pounds.

The establishment of policies or practices by an employer that are neutral on their face, but discriminatory in their effect, and that have no valid relationship to the accomplishment of the particular job, have been thoroughly condemned by the Supreme Court in *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971) and by the Seventh Circuit in *Bowe* v. *Colgate-Palmolive Company*, 416 F. 2d 711 (1969). The 150 pound restriction, as applied by the de-

fendant, does not have a valid relationship to the ability of a person weighing less than 150 pounds to perform the task required of him and, therefore, does not constitute a bona fide occupational qualification, and, hence, defendant may not vindicate its policy by relying on that defense. See *Bowe* v. *Colgate-Palmolive Company, supra.*

4. The statistics, showing that the defendant did not employ any females on the production line, and did not even examine them for employment, entitled the plaintiff to judgment as a matter of law. See *Parham* v. *Southwestern Bell Telephone Company*, 433 F. 2d 421 (8th Cir. 1970).

5. The defense that the company asserts of hiring disadvantaged veterans and other persons who are worthy of employment because of special handicaps is not a valid defense to a charge of sex discrimination under the Act. See 42 U.S.C. § 2000e-2(e).

6. The Court, being unable to determine from the records when plaintiff or any members of her class would have been employed, had it not been for the discriminatory practices of the defendant, concludes that it is without authority to award any backpay or any monetary damages to plaintiff or any members of her class. The only cases in which backpay has been awarded to a potential employee, who was discriminated against and not employed, are those involving individual employees where it was definitely shown that they would have been entitled, on a date certain, to be employed and after computation could be made of the wages to which they were entitled. See *Gates* v. *Georgia Pacific Corporation*, 326 F. Supp. 397 (D.C. Ore. 1970). Any award of damages in this case, therefore, would be speculative and must be denied.

7. Since the Court has previously held this to be a class action, pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, and has mandated the sending of class action notices to those females who were denied employ-

ment between the period October 10, 1969 and April 13, 1972, the Court must also consider the matter of employment relief to be afforded those persons in the class who may indicate to the Court their desire still to be employed by Ford Motor Company. An exact formulation may not be made at this time, but after information has been received as to the number of persons who are entitled to relief, and who are interested therein, the relief to be granted will be based on principles enunciated in *Castro* v. *Beecher*, 459 F. 2d 725 (1st Cir. 1972), at pp. 736, 737 and 738.

8. Relief contemplated by the Court would be:

(a) that physical examination be afforded to all female applicants who are members of the class and still wish relief;

(b) that all such female applicants, who pass the physical examination and who are otherwise qualified, be placed in a priority pool;

(c) that a second pool be created out of the list of presently qualified applicants at Ford, both male and female;

(d) that whenever vacancies occur on the production line at the Kentucky Truck Plant one female from the priority pool be employed to every three from the second pool until the priority pool has been exhausted. The ratio of one to three set out by the Court is not considered by the Court to be binding on it, because at this time the exact number of persons in the class who are still interested in relief is not known.

As stated in *Castro* v. *Beecher*, supra, if the number in the priority pool is not large, this would enter into the Court's judgment in fixing a smaller ratio. While the *Castro* court does not explain what is meant by the term "large", it is pointed out that the district court should have discretion in fixing the priority pool procedures in such a way as to correct the inequities caused by the discriminatory effects of the past.

Statistics afforded to the Court by the parties indicate that there are only 11 women employees on the production line out of more than 3,300 employees; whereas, the number of applicants during the most recent six months period brought to the Court's attention reflects a ratio of approximately 15 male applicants to every one female applicant. The priority pool method proposed here, when finally determined, will help eliminate such discriminatory effects.

9. Finally, the Court concludes it should retain jurisdiction of this action for a reasonable period of time to insure the continued implementation of what appears now to be Ford's policy of equal employment opportunities. See *Parham* v. *Southwestern Bell Telephone Company*, supra, at p. 429; and *United States* v. *Dillon Supply Company*, 429 F. 2d 800 (4th Cir. 1970). The Court holds that a period of 18 months following the entry of judgment should be sufficient to meet this purpose.

10. Plaintiff is awarded its costs herein expended and counsel fees in the sum of $11,500, as noted in a separate opinion of this Court.

11. This action will stand submitted for final judgment following the receipt by the Court of the information as to the number of employees of the class represented by plaintiff actually interested in securing employment at Ford Motor Company's Kentucky Truck Plant.

August 23, 1973

(s) Charles M. Allen
United States District Judge

cc: Counsel of Record

APPENDIX B

May 20, 1974

CERTIFIED MAIL

Mr. James A. Higgins, Clerk
U. S. Court of Appeals
for the Sixth Circuit
U. S. Post Office and Court House
5th and Walnut Streets
Cincinnati, Ohio 45202

Re: Meadows v. Ford Motor Co., et al.
Nos. 74-1258, 74-1259

Dear Sir:

Please be advised that International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and its Local Union No. 862, defendants-appellees in the above-captioned case, are not filing a brief in this matter because:

1. No mention is made of said Local or International either in Appellant's brief or Amicus' brief and, therefore, there is nothing to which the Unions can respond.
2. Even though an appeal was taken from all previous orders of the court including the dismissal of the International Union on October 13, 1971 (35a) because no charge was filed with the EEOC against the International; hence, under the doctrine of *Bowe* v. *Colgate Palmolive*, 416 F. 2d 711 (7th Cir. 1969) the International was not a proper party to the suit; and
3. The Complaint was dismissed as to the Local Union because the Local had absolutely nothing to do with the hiring practices of the Ford Motor Company (Sexton Affidavit at 282 and Tolliver Interrogatory at 122a-

123a). Therefore no issue of a material fact was presented; and

4. We write this letter after consultation with the Clerk's office rather than file a brief because of the above facts. We trust this procedure is acceptable to the Court and that this letter will be distributed to the panel along with the briefs of the other parties.

5. Counsel for the Unions desires to be notified when the case is set and to appear when the case is called.

Respectfully submitted,

SEGAL, ISENBERG, SALES & STEWART
(s) Herbert L. Segal

HLS/vc
CC: Mr. Edgar Zingman
Mr. Jon L. Fleischaker
Mr. James C. Hickey
Mr. Thomas L. Hogan

APPENDIX C

Nos. 74-1258
74-1259

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DOLORES MARIE MEADOWS - - *Plaintiff-Appellant Cross-Appellee*

v.

FORD MOTOR COMPANY - - - *Defendant-Appellee Cross-Appellant*

LOCAL 862, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; and INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - - - - - *Defendants-Appellees*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

PETITION OF APPELLEES UAW FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

SEGAL, ISENBERG, SALES & STEWART
Third Floor, Marion E. Taylor Bldg.
Louisville, Kentucky 40202

By: _____
HERBERT L. SEGAL
Attorney for Defendant-Appellee Union

May it please the Court:

Appellee-Unions file this petition for rehearing because we believe that at least as to the seniority issue the Court's opinion is subject to misinterpretation and requires clarification. Succinctly stated there are three major points we wish to make:

1. The Court's observations as to constructive seniority are subject to at least two interpretations as will more specifically hereinafter be set out.

2. This issue was not fully briefed.

3. The Court should not rule on retroactive seniority now because, among other reasons, the issue of retroactive seniority is now before the United States Supreme Court on a petition for Certiorari in *Franks* v. *Bowman Transportation Co.*, 495 F. 2d 398 (5th Circuit 1974), 43 USLW 3431 (Feb. 4, 1975).

I. AMBIGUITY IN THE COURT'S OPINION

In its opinion this Court said:

> "There is, however, no prohibition to be found in the statute we construe in this case which prohibits retroactive seniority and, of course, the remedy for the wrong of discriminatory refusal to hire lies in the first instance with the District Judge." (Sl.Op. at 19).

However, the Court also said:

> "On remand the District Judge may desire to hear the policy questions involved in this problem before remanding the individual claims to the Master." (Sl.Op. at 19).

The first quoted sentence is subject to the possible interpretation, namely that the Court is explicitly ruling that Title VII does *not* proscribe retroactive seniority as a remedy for an alleged hire date discrimination by an employer:

Conversely, the first quote implies that retroactive seniority for alleged hire date discrimination is one possible remedy. That the Court did not intend this sentence be so interpreted is suggested by the "On remand" quote.

We believe that this Court did not intend to rule on the retroactive seniority issue but intended instead to include that issue in its remand to the District Court. If the District Court rules that Title VII proscribes such a remedy, that issue would be laid to rest at the District Court. If, however, the District Court rules that Title VII does not proscribe such a remedy, then the District Court would determine what remedy is appropriate here.

II. AND III. ISSUE NOT FULLY BRIEFED HERE AND IS NOW BEFORE THE UNITED STATES SUPREME COURT

One of the reasons we believe that the Court should make clear that it has not ruled on this issue is that this issue was not squarely presented or fully briefed and argued. Moreover, the issue has been decided differently by two Courts of Appeal and is pending before the Supreme Court. See *Jurinko* v. *Edwin L. Wiegand Co.*, 477 F. 2d 1038 (3rd Cir.), vacated, 414 US 971 (1973), reinstated, ____ F. 2d ____, 7 FEP 787 (3rd Cir. 1974) and *Frank* v. *Bowman Transportation Co.*, supra.

The Fifth Circuit expressly ruled that Title VII proscribes retroactive seniority as a remedy in such cases. *Frank* v. *Bowman Transportation Co.*, supra. See also *Jersey Central Power and Light Co.* v. *EEOC*, (3rd Cir., Jan. 30, 1975) BNA Daily Labor Report, Jan. 31, 1975 (No. 22) E-1.

In *Jersey Central Power and Light Co.*, the Third Circuit said:

> "We thus conclude in light of the legislative history that on balance a facially neutral company wide sen-

iority system *without more*, is a bona fide seniority system and will be sustained even though it may operate to the disadvantage of females and minority groups as a result of past employment practices. If a remedy is to be provided alleviating the effects of past discrimination perpetuated by lay offs in reverse order of seniority, we believe such remedy must be prescribed by the legislature and not by judicial decree."

In sum, we ask this Court to:

1. Make clear that it has not ruled on the issue of whether Title VII proscribes retroactive seniority as a remedy for an employer's hiring date discrimination; and

2. Direct the District Court to rule on this issue.

Respectfully submitted,

SEGAL, ISENBERG, SALES & STEWART
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Louisville, Ky. 40202
Telephone: 587-8885
Attorney for Defendant-Appellee Union

This is to certify that a copy of the foregoing was mailed this 11th day of February, 1975, to Hon. Ed Zingman, 2800 Citizens Plaza, Louisville, Ky. 40202 and Hon. James Hickey, Commonwealth Bldg. Louisville, Ky. 40202, and Hon. William Carey, EEOC, 1800 G Street NW, Washington, D.C. 20506.
(s) HERBERT L. SEGAL